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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
Services

PUBLIC COPY

[redacted]

FILE: [redacted] Office: ATLANTA Date: JUL 30 2009

MSC 05 358 12246

[redacted]

IN RE: Applicant: [redacted]

APPLICATION: Application for Status as a Temporary Resident pursuant to Section 245A of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. If your appeal was sustained, or if the matter was remanded for further action, you will be contacted. If your appeal was dismissed, you no longer have a case pending before this office, and you are not entitled to file a motion to reopen or reconsider your case.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The application for temporary resident status pursuant to the terms of the settlement agreements reached in *Catholic Social Services, Inc., et al., v. Ridge, et al.,* CIV. NO. S-86-1343-LKK (E.D. Cal) January 23, 2004, and *Felicity Mary Newman, et al., v. United States Immigration and Citizenship Services, et al.,* CIV. NO. 87-4757-WDK (C.D. Cal) February 17, 2004, (CSS/Newman Settlement Agreements) was denied by the Director, Atlanta, Georgia, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant submitted a Form I-687, Application for Status as a Temporary Resident under Section 245A of the Immigration and Nationality Act (Act), and a Form I-687 Supplement, CSS/Newman Class Membership Worksheet. The director determined that the applicant had not established by a preponderance of the evidence that he had continuously resided in the United States in an unlawful status for the duration of the requisite period. The director denied the application, finding that the applicant had not met his burden of proof and was, therefore, not eligible to adjust to temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreements.

On appeal, counsel asserts that the director did not take into account the passage of time and the difficulties in obtaining corroborative documentation of unlawful residence.

An applicant for temporary resident status must establish entry into the United States before January 1, 1982, and continuous residence in the United States in an unlawful status since such date and through the date the application is filed. Section 245A(a)(2) of the Act, 8 U.S.C. § 1255a(a)(2).

The applicant must also establish that he or she has been continuously physically present in the United States since November 6, 1986. Section 245A(a)(3) of the Act, 8 U.S.C. § 1255a(a)(3). The regulations clarify that the applicant must have been physically present in the United States from November 6, 1986 until the date of filing the application. 8 C.F.R. § 245a.2(b)(1).

For purposes of establishing residence and presence in accordance with the regulation at 8 C.F.R. § 245a.2(b), "until the date of filing" shall mean until the date the alien attempted to file a completed Form I-687 application and fee or was caused not to timely file, consistent with the class member definitions set forth in the CSS/Newman Settlement Agreements. Paragraph 11, page 6 of the CSS Settlement Agreement and paragraph 11, page 10 of the Newman Settlement Agreement.

An alien applying for adjustment of status has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite periods, is admissible to the United States under the provisions of section 245A of the Act, and is otherwise eligible for adjustment of status. The inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. *See* 8 C.F.R. § 245a.2(d)(5).

Although the regulation at 8 C.F.R. § 245a.2(d)(3) provides an illustrative list of contemporaneous documents that an applicant may submit in support of his or her claim of continuous residence in the United States in an unlawful status since prior to January 1, 1982, the submission of any other relevant document including affidavits is permitted pursuant to 8 C.F.R. § 245a.2(d)(3)(vi)(L).

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). In evaluating the evidence, *Matter of E-M-* also stated that "[t]ruth is to be determined not by the quantity of evidence alone but by its quality." *Id.* Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

At the time the applicant filed his current Form I-687 application, he provided no documentation to establish continuous residence and physical presence in the United States during the requisite period.

In his declaration dated November 1, 1991, and at the time of his interview on June 22, 2006, the applicant indicated that he first entered the United States in September 1981 with a B-2 nonimmigrant visa and departed the United States in August 1982 for one month. The applicant also indicated that he departed the United States in September 1985 and reentered with a B-2 nonimmigrant visa on October 25, 1985.

On September 7, 2006, the director issued a Notice of Intent to Deny, which advised the applicant that he had failed to submit evidence of continuous residence in the United States since prior to January 1, 1982 through 1987. The applicant was also advised that under a separate proceeding (LIFE), he had been given the opportunity to submit evidence of his eligibility, but he failed to provide a response.

Counsel, in response, asserted that the application should not be denied due to the credibility of the evidence that was submitted. Counsel cited Section 11 of the Newman Settlement Agreement, which states that in adjudicating the application, the director shall utilize the standards set forth in 8 C.F.R. 245a.2(k)(40 and in evaluating the sufficiency of the applicant's proof of residence, the

director shall take into account the passage of time and the applicant's difficulties in obtaining corroborative documentation of unlawful residence.

The director considered counsel's brief, but noted that no documentation was submitted with the brief to establish the applicant's eligibility. The director determined that the applicant had failed to submit sufficient credible evidence establishing his continuous residence in the United States since prior to January 1, 1982, and, therefore, denied the application on July 31, 2007.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also, Janka v. U.S. Dept. of Transp., NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. See, e.g. Dor v. INS, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

As previously noted, the applicant had filed an application for permanent resident status under the Legal Immigration Family Equity (LIFE) Act.[1] Along with the LIFE application, in an attempt to establish continuous residence in the United States from before January 1, 1982 through May 4, 1988, the applicant only provided: 1) a motor vehicle report dated January 11, 2002, from the Georgia Department of Motor Vehicle (DMV), which indicates that his driver's license was issued on November 23, 1982, and lists his address as [redacted] Georgia; and 2) a copy of his passport, which reflects that his passport was renewed on June 3, 1986, at the Malaysia Embassy in Washington.

The record reflects that the applicant filed his initial Form I-687 application in January 1991 and was issued alien registration number [redacted]. Along with the application, the applicant submitted:

- A Georgia driver's license temporary permit receipt, which listed an examination date of December 16, 1986 and the applicant's address in Duluth, Georgia at [redacted]
- An envelope postmarked July 30, 1986 and addressed to the applicant in Lilburn, Georgia at [redacted]
- Three envelopes postmarked in 1983 and addressed to the applicant in Douglasville, Georgia at [redacted], Georgia at [redacted]; and in Stone Mountain, Georgia at [redacted]
- A copy of his passport, which reflects that the applicant was issued a multiple nonimmigrant visitor visa in September 1982 in Kuala Lumpur, Malaysia, he lawfully entered the United States on September 21, 1982, and October 25, 1985, and the passport was renewed on June 3, 1986, at the Malaysia Embassy in Washington.

[1] The LIFE application was denied on August 18, 2005. Although the applicant was given the opportunity to appeal the decision, no Notice of Appeal was filed.

The documents submitted with his LIFE and initial Form I-687 applications, however, do not serve to establish that the applicant was residing in the United States prior to January 1, 1982.

The record also reflects that a petition for Prospective Immigrant Employee, Form I-140, was filed by [redacted] on behalf of the applicant on May 15, 1987.[2] The petitioner indicated on the Form I-140 to have employed the applicant since January 1986. Accompanying the Form I-140 are employment letters from [redacted] in Bentong, Malaysia and a Form ETA 750, Application for Alien Employment Certification. The employment letters attest to the applicant's employment as a chef from 1980 to 1982 and to his resignation in mid 1982. Part B of the Form ETA 750 signed by the applicant on January 7, 1987, lists his employment at [redacted] in Bentong, Malaysia from 1980 to June 1982.

Therefore, based on the foregoing, the applicant neither entered the United States prior to January 1, 1982, nor maintained continuous unlawful residence through the date he lawfully entered the United States on September 21, 1982 as required under 8 C.F.R. § 245a.2(b)(1). The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act on this basis.

ORDER: The appeal is dismissed. This decision constitutes a final notice of ineligibility.

[2] The Form I-140 was denied on August 26, 1988, and the appeal was dismissed by the AAO on August 30, 1989.